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SUPREME COURT, U.S.

U.S. Supreme Court No. 08-20

In the Supreme Court of the United States

DEBRA SLONE
SONJA EBRON,
Petitioners,

vs.

BONNIE MYERS
PATRICIA HEATHERINGTON
A&E REAL ESTATE SALES AND MGMT, INC.
CSS SERVICES, INC.
WILLIAM W. WEST,
Respondents.

On Petition for Writ of Certiorari
to the Georgia Court of Appeals
(Georgia Court of Appeals
Cases A07A1089, A07A1406, A07A2274)

PETITIONERS REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF OF PETITIONERS

Petitioners respectfully reply to Respondents' brief. Petitioners asked for review of a state appellate court decision affirming dismissal of their claims against Respondents and affirming a sanction of attorney's fees for filing the claims. Petitioners argued that the decisions were arbitrary and capricious and that Petitioners were treated differently than similarly situated persons.

Reply to Respondents' Factual Statements

There are no factual disputes relevant to the issue presented for review – whether Georgia applied its abusive litigation and attorney's fees statutes unconstitutionally in this case. The following facts are undisputed:

- Petitioners sued Respondents for forgery, theft and Georgia RICO violations occurring in a prior dispossessory action against Petitioners, in which Respondents' claim was dismissed for lack of standing.
- As a matter of law, the trial court precluded Petitioners' claims with an unasserted claim for abusive litigation and dismissed the case for failure of notice, a condition precedent to an abusive litigation claim.
- Subsequent to dismissal, the trial court awarded attorney's fees to Respondents in both the prior dispossessory action and the instant case without affording Petitioners an opportunity to evince substantial justification for their claims.

- The trial court denied Petitioners' request for injunctive relief to protect the viability of their claims on appeal, finding Petitioners lacked standing due to their relocation out of state.
- The appellate court affirmed the dismissal, the denial of equitable relief, and the second award of attorney's fees, remanding the first for a hearing.

Disputes regarding Petitioners' payment of rent in the dispossessory action and Respondents' liability in the instant case are not relevant to this Court's review of the Petition.

Reply to Respondents' Arguments

A. The Issue Is Preserved.

Respondents argue that Petitioners failed to properly raise and preserve a federal constitutional challenge in state courts, asserting that Petitioners have not borne their burden under *Adams v. Robertson*, 520 U.S. 83; 117 S. Ct. 1028 (1997) of showing that the state court had a fair opportunity to address the federal question presented, and thus the Court lacks jurisdiction to grant the Petition. *Br. of Resp.*, p. 4-5. Petitioners' burden under *Adams* has been met. The Petition contains numerous quotations from Petitioners' state court briefs raising constitutional challenges, including explicit references to due process and equal protection. *Br. of Pet.*, p. 7-11. One of the questions presented to the Georgia Supreme Court in a petition for writ of certiorari asked specifically whether Petitioners had been denied access to Georgia's courts. *Pet. for Writ*

of Cert., Supreme Court of Georgia, Case No. S08C0413, p. ii. The entire trajectory of Petitioners' appellate arguments was that an arbitrary, discriminatory and unauthorized use of state statutes had occurred in this case.

There is no requirement that specific language be used to raise federal constitutional challenges if Petitioners' intentions are clear. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63; 49 S. Ct. 61 (1928) ("There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time. And, upon appeal, if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."). While no state court explicitly ruled on a federal question, Petitioners have shown through voluminous citations to their arguments that the state courts had a fair opportunity to decide the question presented to this Court. *Br. of Pet.*, p. 7-11. In the face of Petitioners' arguments below, the state appellate court implicitly ruled that dismissal of their claims and sanctions for raising them – in opposition to controlling statutory and case authority – were consonant with Petitioners' due process and equal protection rights. *Street v. New York*, 394 U.S. 576; 89 S. Ct. 1354 (1969) ("Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny

the claim, that is enough."). The state appellate court cannot avoid this Court's review by refusing to directly address Petitioners' constitutional challenges.

B. This Important Federal Question Of First Impression Merits Review.

The question implicates limits on the judiciary.

Respondents argue that Petitioners failed to show that a Georgia court decided an important federal question. *Br. of Resp.*, p. 5. In essence, the question presented is whether Petitioners have the right to assert and prosecute thoughtfully chosen tort claims without arbitrary substitution and sanction. Where these rights go unrecognized, the judiciary can willy-nilly make cases not presented by arbitrarily restating litigants' claims, thereby assuming a function of the legislature. The Fourteenth Amendment prevents this usurpation of power.

Georgia's abusive litigation regimen is unique.

Georgia's isolation also adds gravity and significance to this case. A claim for abuse of process is the generally accepted remedy for malicious and unjustified acts of litigation. Restatement (Second) of Torts 682 (1997). While laws against abuse of process are used nationally to curtail frivolous lawsuits that clog the legal system, most states are reluctant to introduce statutes that might discourage citizens from using the judicial system to settle their disputes. Forty states require a showing of willful pursuit of ulterior purpose to assert a proper claim

for abuse of process. Alaska is typical: "The Restatement (Second) of Torts defines abuse of process as the misuse of a legal process against another primarily to accomplish a purpose for which it was not designed. Alaska requires two elements for the claim: (1) ulterior purpose independent from the process, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding." *Greywolf v. Carroll*, 151 P.3d 1234 (2007).

Of the remaining states, Iowa, New Hampshire, Pennsylvania and Utah use more specific language, requiring a showing that the nonmovant used a legal process "primarily to accomplish a purpose for which it is not designed." *Fuller v. Local Union No. 106*, 567 N.W.2d 419, 421 (1997); *Long v. Long*, 136 N.H. 25; 611 A.2d 620, 623 (1992); *Rosen v. American Bank of Rolla*, 426 Pa. Super. 376; 627 A.2d 190, 192 (1993); *Gilbert v. Ince*, 1999 UT 65; 981 P.2d 841, 845 (1999). Delaware, Kansas, New Mexico and West Virginia require an improper act in the use of process to accomplish an illegal, perverted or wrongful end. *Ferguson v. Wesley College, Inc.*, C.A. No. 99C-07-109 WTQ; Del. Super. LEXIS 146 (2000); *McShares, Inc. v. Barry*, 266 Kan. 479; 970 P.2d 1005 (1998); *Devaney v. Thriftway Mktg. Corp.*, 124 N.M. 512; 1998 NMSC 1; 953 P.2d 277 (1997); *Preisner v. MacQueen*, 177 W. Va. 273; 352 S.E.2d 22 (1985). Wisconsin requires a further showing that a claim was "without any reasonable basis in law or equity." *Stern v. Thompson & Coates, Ltd.*, 185 Wis.2d 220; 517 N.W.2d 658 (1994).

Excepting the safe harbor language in Federal Rules of Civil Procedure 11, only Georgia adds a

notice requirement and an exclusive remedy to its abuse of process or "abusive litigation" regimen. As a derogation of the common law, Georgia recognizes that its abusive litigation statutes must be strictly construed. *Denton v. Browns Mill Development Company, Inc.*, 275 Ga. 2; 561 S.E.2d 431 (2002). Petitioners contend the exclusive remedy provision was so liberally construed in this case as to offend the federal constitution. The instant case is one of first impression that merits this Court's review.

C. Application Of The Statutes Is Not Rationally Related To Legitimate State Interest.

Petitioners have asserted that the state court rulings were arbitrary and capricious in violation of substantive due process provisions. Petitioners have also asserted that the state court rulings treated Petitioners differently than similarly situated persons in violation of equal protection provisions. (Petitioners challenge the application of the statutes, not the statutes themselves.) Respondents argue that the state court rulings do not violate either the due process or equal protection clauses of the Fourteenth Amendment because the statutes are rationally related to legitimate state interests. *Br. of Resp.*, p. 6-10.

Respondents do not dispute that the factual allegations in Petitioners' complaint (the only evidence presented) did not meet the statutory elements of abusive litigation, and that neither the trial court nor the appellate court found an abusive litigation claim in Petitioners' complaint, both finding the abusive litigation regimen applicable

solely because the torts arose in prior civil litigation.[1] While Georgia statutes provide an exclusive remedy for claims of malicious and unjustified acts of litigation, there is no statutory or case authority in Georgia law that permits the preclusion of tort claims not predicated on an abusive litigation claim. Nowhere does the mere commission of a tort in civil litigation provide sufficient rationale to apply the abusive litigation regimen to the resulting claims, except in the instant case.

Petitioners agree with Respondents that disparate treatment of parties damaged by acts of malicious and unjustified civil litigation is rationally related to a legitimate governmental interest. However, disparate treatment of parties damaged by acts of civil litigation – whether justified or not – bears no rational relationship to a legitimate governmental interest. Petitioners contend the creation of this class, seen only in the instant case, violates the Fourteenth Amendment's provisions for substantive due process and equal protection.

Respondents do not dispute that the decision to preclude claims based in factual allegations by an unasserted claim not based in fact was arbitrary and capricious, or that the decision to dismiss that unasserted claim for failure of notice was arbitrary and capricious, or that the decision to sanction

[1] Respondents summarize the decision best: "The Superior Court ruled that Petitioners' claim arose from acts occurring during litigation and therefore Petitioners were required to pursue the exclusive remedy of an abusive litigation claim against Respondents under O.C.G.A. § 51-7-85. The Superior Court ruled an abusive litigation claim was procedurally barred by Petitioners' failure to provide the safe harbor notice letter required by O.C.G.A. § 51-7-84." *Br. of Resp.*, p. 2.

Petitioners for asserting claims grounded in their factual allegations was arbitrary and capricious. Petitioners do not seek review of the injunction decision, except to note that the denial of injunctive relief based on a mischaracterization of the property sought to be protected epitomized the arbitrary and capricious nature of the rulings in this case. Respondents also do not dispute that the decision to subject Petitioners' claims to the abusive litigation regimen solely on the basis that such claims arose in prior litigation differs from the treatment of similarly situated Georgia persons. Compare *Dee v. Sweet*, 218 Ga. App. 18; 460 S.E.2d 110 (1995) and *Rains v. Dolphin Mortgage Corporation*, 241 Ga. App. 611; 525 S.E.2d 370 (1999) (where civil RICO claims predicated on torts occurring in prior litigation were not precluded); *Phillips v. MacDougald*, 219 Ga. App. 152; 464 S.E.2d 390 (1995) and *Nairon v. Land*, 242 Ga. App. 259; 529 S.E.2d 390 (2000) (where claims were precluded upon showing predication on abusive litigation claims); *Webb v. State Automobile Insurance Company*, 198 Ga. App. 609; 402 S.E.2d 352 (1991) and *Taylor v. Gelfand*, 233 Ga. App. 835; 505 S.E.2d 222 (1998) (where asserted claims were adjudicated on merits even though allegations met the elements of abusive litigation); *Ibrahim v. Talley & Associates, P.C.*, 214 Ga. App. 609; 448 S.E.2d 707 (1994) (where claim for forgery occurring in litigation was adjudicated on the merits despite factual allegations meeting all elements of abusive litigation).

To reiterate, there is no rational government interest in disparate treatment of a class of civil defendants injured in substantially justifiable litigation. Members of such a class have no remedies

for the wrongs they have suffered. That is, a wrongful act committed against a party to substantially justified civil litigation has no remedy under current Georgia law. As Justice Stevens recently noted, "A basic principle animating our jurisprudence was enshrined in state constitution provisions guaranteeing, in substance, that 'every wrong shall have a remedy.' Fashioning appropriate remedies for the violation of rules of law designed to protect a class of citizens was the routine business of judges." *Stoneridge Investment Partners v. Scientific-Atlanta*, 128 S. Ct. 761; 169 L. Ed. 2d 627 (2008), dissenting opinion *(citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803)).

Likewise, the application of the attorney's fees statute in this case bore no rational relationship to a legitimate government interest. Attorney's fees are assessed against parties found to have filed claims or taken positions lacking in substantial justification or for purposes of delay or harassment. Official Code of Georgia Ann. § 9-15-14 is rationally related to the state's interest in maintaining efficient and orderly courts. However, there can be no rational relationship between this legitimate governmental interest and the assessment of sanctions with no showing of sanctionable conduct.

Respondents do not dispute that no evidence supporting the sanctioned claims was allowed or reviewed by the court, or that Respondents presented no evidence of lack of substantial justification for Petitioners' claims. Nor do Respondents dispute that attorney's fees were assessed in this case in conflict with voluminous state case law, being arbitrary and capricious and evincing disparate treatment of

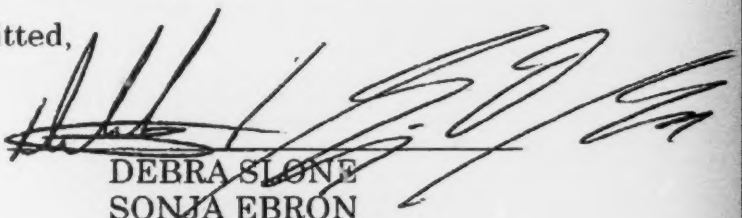
similarly situated persons. While Official Code of Georgia Ann. § 9-15-14(b) provides that attorney's fees may be awarded only to parties to the litigation, the state appellate court declined to reverse an award of attorney's fees to Respondent West in the dispossessory action, where West was a non-party. *Order of the Georgia Court of Appeals*, p. 9. (See also *Br. of Pet.*, p. A9.) While Official Code of Georgia Ann. § 9-15-14(a) provides mandatory sanctions for a claim completely lacking in any justiciable issue, the state appellate court affirmed awards under this statute based on the lesser standard for discretionary awards provided by Official Code of Georgia Ann. § 9-15-14(b). *Order of the Georgia Court of Appeals*, p. 13. (See also *Br. of Pet.*, p. A13.)

The state appellate court affirmed these awards without referencing any evidence of sanctionable conduct. *Order of the Georgia Court of Appeals*, p. 13. (See also *Br. of Pet.*, p. A13.) Again, awards under Official Code of Georgia Ann. § 9-15-14(a) must be supported by specific findings of sanctionable conduct. *DeKalb County v. Adams*, 263 Ga. App. 201; 587 S.E.2d 302 (2003); *DeRossett Enterprises, Inc. v. General Electric Capital Corporation*, 275 Ga. App. 728; 621 S.E.2d 755 (2005); *H.J. Russell & Company v. Manuel*, 264 Ga. App. 273; 590 S.E.2d 250 (2003). No award of attorney's fees is justified where there is arguable support for the sanctioned position. *Ellis v. Johnson*, 263 Ga. 514; 435 S.E.2d 923 (1993). There is no rational relationship between the application of the attorney's fees statute in this case and any legitimate state interest.

Conclusion

The Court should grant the petition for certiorari.

Respectfully submitted,



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